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Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law, The

Julie Macfarlane

The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law

*Dr. Julie Macfarlane**

There are signs of the evolution of a new professional identity for lawyers which, while rooted in traditional models of lawyering is responsive to a new climate of disputing. In an era of "vanishing trials"[1] and civil justice reforms which favor the development of mandatory and voluntary settlement processes, effective negotiation and settlement skills are becoming increasingly central to the practice of law and occupy more of lawyers' real time and attention than adversarial trial lawyering. My book "The New Lawyer: How Settlement is Transforming the Practice of Law" draws on empirical research to analyze different aspects of this new lawyering role and the changing norms of legal practice. The book argues that changes taking place in legal practice and public culture as we enter the twenty-first century are driving the emergence of what I call "the new lawyer."

The profession is yet to fully come to terms with changes in the disputing landscape or the many other ways in which legal practice has changed—for example its business model, its demographics, and the changing expectations of clients—over the last thirty years. Some degree of hesitancy and even reluctance to embrace and respond to change should not surprise us—some may be hoping that if they wait long enough, the changes will simply go away (a sentiment most commonly expressed about procedural changes which increase judicial oversight of litigation and require earlier efforts at settlement). Changes in professional role and identity are always incremental and often painful. Regardless of the pace of change, however, there are indisputable signs that at least some members of the profession are rethinking legal practice and service models in order to better match the needs and expectations of twenty-first century clients, both corporate and personal.

In this paper, I shall first briefly examine some of the most significant changes affecting legal practice, especially civil litigation, and ask what adjustments in the professional identity and role of the lawyer these imply or perhaps even require from lawyers. I shall also consider what evidence we have for the evolution of the "new lawyer." I shall then approach these questions from a practice-based perspective, looking specifically at client advocacy, legal negotiation, and the lawyer-client relationship.

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* Dr Julie Macfarlane is Professor of Law at the University of Windsor. Her new book, THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW, is published by University of British Colombia Press and distributed in the US by John Hopkins University Press.

1. Mark Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. OF EMPIRICAL LEGAL STUDIES 459 (2004). The most recent (2002) study shows that just 1.8 percent of filings in the US Federal Court go to a full trial, down from 11.5 percent in 1962. *Id.* at 459.

I. TIMES OF CHANGE

There have been seismic changes in the legal profession—especially in its internal structures and in legal disputing procedures—over the last thirty years. The "vanishing trial" phenomenon is just one aspect of this, but it is a vital one. A 98% civil settlement rate[2] and the increasing use of negotiation, mediation, and collaboration in resolving lawsuits have dramatically altered the role of the lawyer. The traditional conception of the lawyer as "rights warrior" no longer satisfies client expectations, which center on value for money and practical problem solving rather than on expensive legal argument and arcane procedures.

At the same time, the business model of the profession has altered dramatically. Legal practice is now dominated by large firms and corporate customers. The economics of legal practice have been transformed by widespread reliance on billable hours, which reinforces both internal hierarchies and the traditional, time-consuming tasks of legal practice—the accumulation of vast amounts of information and procedural machinations, while litigation moves along at a sluggish pace. Yet business clients are increasingly practicing self-help when it comes to avoiding protracted litigation. The number of in-house counsel has risen from 3.2% of the profession to almost 10% in the last fifty years.[3] Lawyers tell me over and over that their commercial clients are no longer willing to simply let them run the file; reporting requirements have changed, and there is more oversight to justify the costs of continuing litigation without settlement. For personal clients also, the lawyer-client relationship is fundamentally altered by the trend away from professional deference. Clients of all types want value for money in legal services. Clients are increasingly demanding a role in determining how much time, money, and emotional energy they invest, and in what type of resolution. Both corporate and personal customers appear increasingly unwilling to passively foot the bill for a traditional, litigation-centered approach to legal services, preferring a more pragmatic, cost-conscious, and time-efficient approach to resolving legal problems.

A growing reluctance to spend very large amounts of time and money on litigation has provided an impetus for another highly significant change: justice reform. This is usually initiated by governments that have become impatient with the pace and cost of protracted litigation clogging the courts. The most important of these reforms have introduced mandatory settlement processes into the civil courts, in the form of mediation and judicial settlement conferences. The same rationale—encouraging earlier settlement in as many cases as possible—has prompted the introduction of judge-directed case management in order to move cases along more efficiently.

Less trumpeted and so far less pervasive, we can point to similar changes taking place in criminal law practice, with the introduction of diversion programming and restorative justice alternatives to incarceration, effectively institutionalizing plea bargaining, and offering a range of new processes and sanctions. In family

2. *Id.*

3. Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society, in* LAWYERS: A CRITICAL READER 20, 21 (Richard L. Abel, ed., 1997).

practice also, a quiet revolution is taking place. The family courts have often been more reluctant to press mandatory settlement procedures on parties because of obvious concerns (articulated by an effective lobby) about the potential for coercion and power abuse between spouses. Nonetheless, family courts across North America have been developing diverse, multi-service programs for the past twenty years, offering parties mediation, counseling, and sometimes a meeting with a family judge in an effort to resolve matters short of trial. As well, family law is an area in which voluntary participation in alternatives to litigation has grown exponentially, primarily in the form of family mediation or Collaborative family lawyering. Finally, as the courts push mediation on recalcitrant parties and lawyers, many corporations and institutions have determined for themselves that they wish to adopt new voluntary policies and codes of practice that emphasize a problem-solving approach to conflict resolution and aim to reduce their litigation budget.

Changes in procedure, voluntary initiatives, and changing client expectations are coming together to create a new role for counsel and a new model of client service. This role is moving away from the provision of narrow technical advice and strategies that center on litigation and fighting (i.e. the "warrior lawyer") towards a more holistic, practical, and efficient approach to conflict resolution. The result is a new model of lawyering practice that builds on the skills and knowledge of traditional legal practice but is different in critical ways. The new lawyer is not completely unrelated or dissimilar to the warrior lawyer but an evolved, contemporary version. The hundreds of lawyers I have interviewed and observed in the course of empirical research over the last ten years have told me a great deal about the types of skills and knowledge they need in order to be effective in this new environment. Lawyers have many stories to tell about the adjustments in mindset and skill set that are required by these new processes and the ways in which they have altered their relationship with their clients, whether commercial or personal. They also speak about the changes in both their clients' expectations and their own expectations of professional power. As well, I have interviewed hundreds of clients who have given me insight into what they need and want from their lawyers, as well as into their own struggles with adjusting their image of a lawyer from that of a "warrior" to a "conflict resolver." Many other researchers also have explored the significance and impact of these new processes, building a body of empirical work that points to important patterns and themes in the changing nature of legal practice.

Both the emerging and the traditional models of lawyering place legal intelligence at their center as the primary and unique skill of the lawyer. Both approaches require excellent client communication skills, good writing skills, and, sometimes, persuasive oral advocacy skills. Both approaches require effective negotiation. However, the new lawyer realizes that she needs to utilize these skills in different ways and in new and different processes, designed to facilitate earlier settlement. The goals of these processes are almost always information exchange and the exploration of options. Sometimes they include the settlement of some peripheral issues, sometimes full resolution. The warrior lawyer is more familiar with processes that rehearse and replay rights-based arguments, look for holes in the other side's case, and give up as little information as possible. The new lawyer bases her practice on the undisputed fact that almost every contentious matter she handles will settle without a full trial, and some will settle without a judicial hearing of any kind. She assumes that negotiation, often directly involv-

ing her clients, is feasible in all but the most exceptional cases and that in this capacity she is an important role model and coach for her clients. The new lawyer understands that not every conflict is really about rights and entitlements and that these are conventional disguises for anger, hurt feelings, and struggles over scarce resources. The new lawyer recognizes that part of her role is to assist her clients to identify what they really need, while constantly assessing the likely risks and rewards as well as what they believe they "deserve" in some abstract sense. She also understands the purpose and potential of information in settlement processes. In adversarial processes, information is used to gain an advantage over the other side (information as "power over"); in settlement meetings, information is used as a valuable shared resource to broaden the range of possible solutions (information as "power with"). The new lawyer must develop the best possible outcome—often in the form of a settlement—for her client, using communication, persuasion, and relationship building. This is a different role than making positional arguments and "puffing" up the case. It moves beyond the narrow articulation of partisan interests to the practical realization of a conflict specialist role for counsel.

II. THE THREE KEY BELIEFS

Law students are still graduating from law school imagining that their appellate moot court experience is representative of the work they will be doing in practice. Few schools offer negotiation and mediation advocacy courses. There is a misfit between the image of legal practice projected by law school and the reality. There is also a misfit between the core beliefs and values held by many lawyers, often unconsciously and uncritically, and the practical exigencies of the new disputing environment. The clear trend away from trials towards more formalized and numerous methods of settlement negotiation has yet to fundamentally reshape legal education or some of the traditional norms of "good lawyering." Resistance to moving forward with new approaches to legal practice and client service appears to come from a set of entrenched and largely unexamined key beliefs held by lawyers about legal practice.

There are three beliefs which are fundamental to the way that law is traditionally practiced—so fundamental that they are rarely raised to the level of self-conscious articulation. For the purposes of this discussion they can be summarized briefly as follows:

1. A default to rights-based strategies and processes (and an assumption that these are always the most appropriate and effective);
2. An image of justice as process rather than outcomes—while outcomes may be capricious and hard to predict, it is the stable knowable procedural steps of the justice system that afford "justice"; and,
3. That the lawyer is "in charge" in the lawyer-client relationship, by virtue of her superior legal knowledge which is the bedrock of the rights-based strategies she will pursue.

These three key beliefs are first formed at law school and then challenged and refined in practice. They translate into what behaviors and practices are seen as professional, appropriate, and effective. These key beliefs—largely unchanged

and unchallenged through two hundred years of the legal profession—are holding back the development of a modified professional identity for lawyers which is more fully responsive to significant changes in the disputing environment-changes driven by courts, policy-makers, and the consumers of legal services. Modifying these beliefs inevitably affects the behaviors and practices that are critical to the lawyer's professional identity. In the remainder of this paper I shall consider three crucial areas of practice for the new lawyer: client advocacy, legal negotiations, and the lawyer/client relationship. In each of these dimensions of legal practice, the practical relevance and the conceptual clarity of the three key beliefs are now continuously under challenge.

III. CONFLICT RESOLUTION ADVOCACY

Just as adversarial advocacy has evolved out of earlier notions of zealous advocacy, a new conception of advocacy is evolving out of the changing conditions of legal disputing, and in particular, the widespread introduction of court-connected and private mediation programs, case management, judicial mediation, and the "vanishing trial." I shall call this "advocacy as conflict resolution" or conflict resolution advocacy. This does not mean that resolution is the only outcome, but rather that the goal is fair and just resolution wherever possible. Conflict resolution advocacy is at the core of the professional identity of the new lawyer.

The new lawyer will conceive of her advocacy role more deeply and broadly than simply fighting on her clients' behalf. This role comprehends both a different relationship with the client—closer to a working partnership—and a different orientation towards conflict. The new lawyer must help her client engage with the conflict, confronting the strategic and practical realities as well as making a game plan for victory. The new lawyer can offer her client skills and tools for conflict analysis, an understanding of how conflict develops and evolves over time, and the experience of working continuously with disputants on (perhaps similar) disputes. Conflict resolution advocacy means working with clients to anticipate, raise, strategize, and negotiate over conflict and, if possible, to implement jointly agreed outcomes. If jointly agreed outcomes are not possible, or if they fall short of client goals, there are other, familiar, rights-based strategies available that can be pursued either simultaneously or alternatively.

Conflict resolution advocacy requires lawyers to modify two of their three key beliefs, and to extend the third. It challenges the automatic and "obvious" primacy of rights-based dispute resolution, preferring a more nuanced, multi-pronged strategic approach to both fighting and settling. Conflict resolution advocacy understands rights-based strategies as important and useful but rarely exclusive tools for engaging with conflict and seeking solutions. As a result of broadening discussions to include non-legal issues and potential solutions, the role of the client in conflict resolution advocacy becomes more significant in both planning and decision making, modifying the simple notion of the lawyer as the expert who is "in charge." This issue is discussed further below in relation to lawyer/client decision-making, and client participation in dispute resolution processes. Finally, conflict resolution advocacy does not deny or contradict justice as process, but it takes what lawyers already know about the importance of integrity in the processes and procedures of conflict resolution and applies this

awareness to private ordering outside the legal system. As a consequence the new lawyer will be deeply involved in, and knowledgeable about, the design of processes and procedures of negotiation, mediation, and other Collaborative processes that protect their clients' interests and promote trust in the development of solutions.

IV. CONFLICT RESOLUTION ADVOCACY AND CLIENT LOYALTY

There is no lessening of the lawyer's responsibility to achieve the best possible outcome for his client in client resolution advocacy. In fact, advocacy as conflict resolution places the constructive and creative promotion of partisan outcomes at the center of the advocate's role and sees this goal as entirely compatible with working with the other side. In fact, this goal can *only* be achieved by working with the other side. The new lawyer remains just as dedicated to achieving her clients' goals as the warrior or adversarial advocate. What changes is that her primary skill becomes her effectiveness and ability to achieve the best possible negotiated settlement, while she remains prepared to litigate if necessary. There is no contradiction between a commitment to explore every possibility of facilitating an agreement with the other side and a strong primary loyalty to one's own client. One very experienced lawyer describes this loyalty in the following very practical terms:

> I think, to be honest, it's natural for an attorney . . . that my best friend in the room is always going to be my client.[4]

Counsel's loyalty and focus should be on achieving the client's best possible outcome(s). As a result, effective family lawyers should be able to assure their clients: "I shall still get the best deal for you."[5] Or as a commercial litigator put it: "I see a completely different form of adversary process. You call it a mediation [because] we're working together to come up with a deal, but we're still adversaries—I'm still trying to get the best possible deal I can."[6] A contradiction between client loyalty and creative consensus building only exists if counsel is convinced that the only effective way to advance the client's wishes is by using rights-based processes. Aside from these fairly exceptional cases, the goal of the conflict resolution advocate is to persuade the other side to settle—on her client's best possible terms.

Adversarial advocacy offers no frameworks to counsel to resolve classic dilemmas such as when and how to settle, or how to balance their own judgment with the clients' aspirations. Admitting a need to compromise in any way undermines the core of zealous advocacy. Conflict resolution advocacy both anticipates these dilemmas and makes them resolvable on a principled basis. Whereas adversarial advocacy tends to view settlement as capitulation, conflict resolution advocacy is committed to evaluating the pros, cons, and alternatives of any settlement

4. Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. DISP. RESOL. 179, 204.

5. *Id.*

6. Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002 J. DISP. RESOL. 241, 307.

option, which includes an evaluation of the legal, cognitive, and emotional dimensions because all of these are part of how clients appraise settlement.[7]

V. FACT GATHERING AND INFORMATION IN CONFLICT RESOLUTION ADVOCACY

The dominant epistemology of litigation is that knowledge and information have the sole purpose of advancing the client's legal case. This approach means that only information that fits the legal argument is either sought or utilized, and ignores other information that may be important to realizing the client's goals. The adversarial advocate approaches fact-gathering and information as a competitive process, with information withheld from the other side even where it may be of little or no consequence, and often where it would be beneficial in clarifying the relative goals and expectations of each.

In a conflict resolution model the purpose and uses of information are understood differently. First, the type of information that may be important is expanded. The involvement of clients in negotiation and mediation and in planning for these processes allows for the discussion of information that may not have a direct bearing on the legal theory of the case—for example, business issues or personal issues—but which may have an important impact on the resolution of the conflict. If counsel takes seriously her responsibility to engage the client in the resolution of the conflict, she will seek out information that could be key to understanding how to advance the client's interests and needs, as well as his legal entitlements.

Second, conflict resolution advocacy regards information as a shared resource that may advance all party interests. This approach to information sharing requires significant reorientation, both conceptual and collegial. For a less aggressive and more collaborative approach to information sharing to work, lawyers need to be able to build trusting relationships with other counsel and other professionals. There is an obvious need for norms of reciprocity. Such norms have always existed in smaller communities where lawyers are accustomed to providing information as requested without forcing their opponent through procedural hoops. Even where reciprocity is not clearly established, there may be other strategic reasons to send information to the other side. Counsel are accustomed to analyzing what information they need from the other side and what information they are willing to provide to opposing counsel upon request. Effective conflict resolution advocates must in addition consider what information about her client—both his needs and his rights—the other side must be aware of if they are likely to settle, preferably on her client's best possible terms.

VI. RE-ENVISIONING OUTCOMES IN CONFLICT RESOLUTION ADVOCACY

Conventionally, potential negotiated outcomes are measured by how close they come to achieving legal goals and aspirations, framed within the theory of the case. Of course, experienced counsel know that in practice this is not the only measure of success, or even necessarily "success" as the client sees it. Even if

7. See the detailed discussion in Julie Macfarlane, *Why Do People Settle?*, 46 MCGILL L.J. 663 (2001).

"winning" is ultimately achieved, it may not be all that was hoped for. Emotional closure or business viability and recovery are often pushed further away in litigation. In civil trials, the process of resolution may be prolonged further by the need for enforcement steps after securing a favorable judgment, which may partly explain why in my 1995 Ontario study (matching a control group of litigants who went to trial with those who mediated their dispute), only 8.5% of trial group litigants described themselves as completely satisfied with the outcome of their case (either settled between the lawyers or adjudicated).[8] The most frequently given reason for a negative or partly negative assessment of outcome in the remaining 91.5% (obviously including some litigants who won their cases at trial) was the length of time and the emotional energy consumed.[9]

In envisioning and evaluating potential outcomes, conflict resolution advocacy will certainly include proximity to an "ideal" (i.e., successful) legal outcome, but many other factors will also be important. For example, responsible counsel will always consider the issue of costs in planning a conflict resolution strategy. Conflict resolution advocates should consider how far any one outcome will meet client interests. Aside from "winning," these might include, for example, recognition and acknowledgment, business expansion or solvency, future relationships both domestic and commercial, vindication and justice, emotional closure, and reputation. These interests have both short-term and long-term elements. They reflect not only outcome goals but also the importance of procedural justice—feeling listened to, being taken seriously, and being fairly treated. In a conflict resolution model of advocacy, it is not only the final deal that matters but also how the client feels about how it was reached, which includes a sense that the outcome is fair and wise in light of the client's interests and a recognition of the limits of the system to offer alternative, better solutions.

Conflict resolution advocacy is about focusing more of counsel's energy on the creation of good settlements rather than good positions and developing new knowledge and skills to support this new and enhanced focus of their work. Conflict resolution advocacy is less about aggressive posturing and game playing, and more about working with the client to diagnose his needs and priorities and staying open to the creation of new pathways to meet these. It does not mean abandoning rights-based advocacy and even trial work in appropriate cases. In fact, conflict resolution advocacy builds on some traditional skills and knowledge, notably information assimilation, legal research, effective oral communication, strategic planning, and insider knowledge, which are core elements of effective trial advocacy. Conflict resolution advocacy takes these familiar tools and applies them to a newly articulated and more realistic goal: the pursuit of acceptable, reasonable, and durable settlements that meet client interests.

VII. PLACING NEGOTIATION AT THE CENTER OF LEGAL PRACTICE

While ready and able to move to an adjudicated determination in any given case, conflict resolution advocates plan their approach based on one simple and

8. JULIE MACFARLANE, COURT-BASED MEDIATION IN CIVIL CASES: AN EVALUATION OF THE TORONTO GENERAL DIVISION ADR CENTRE 22 (1995).

9. *Id.*

undisputed fact—most cases settle. This recognition opens up the unpredictable and flexible dimensions of strategic bargaining, focusing counsel less on gamesmanship around the rules of engagement (the rules of civil procedure), and more on the management and tactics of negotiation.

The relationship between time spent on procedural steps such as drafting and filing pleadings, preparing and bringing motions, and developing negotiation strategy and actual negotiation is reversed in a model of conflict resolution advocacy. Since, conventionally, lawyers spend little time on negotiation compared to taking procedural steps,[10] this reversal represents a significant shift of time and energy. Some lawyers already see the time they spend on procedural matters as an aspect of negotiation—in effect, softening up and checking out the other side in preparation for bargaining—but, in this approach, negotiation is a mere sub-set of procedural maneuvers and not an explicit tactic. In conflict resolution advocacy, the development and implementation of effective negotiation strategies is moved to the center of what advocates offer their clients.

This shift transforms how we think about negotiation into a discrete skill set, rather than regarding it as a subsidiary or a secondary element of other lawyering practices. It catapults the self-conscious development of negotiation skills, which are evaluated by their effectiveness rather than justified by their habitual character, up the hierarchy of lawyerly skills and capacities. Taking negotiation strategy seriously makes the routine dynamic of exchanging written offers before "sawing it off in the middle" appear inadequate and gauche. Instead, conflict resolution advocacy demands that negotiation planning be addressed even in the earliest stages of file development as a part of the process of canvassing goals, priorities, and alternatives with the client. An early and explicit focus on the potential for negotiated settlement requires the holistic framing of the problem rather than the selective use of information in a way that narrows the case to its generic legal issues. This may also shift the planning focus away from procedural steps and deadlines and towards the development of a complete strategy for file management, which is perhaps worked out within a team or between those in a firm's litigation and corporate departments.[11] As one lawyer, whose practice was dramatically altered by the introduction of mandatory civil mediation, reflected:

> [M]y practice is more and more on the phone talking about strategy. Less and less do I ever mention the words civil procedure.[12]

Intimidation, aggressive positionality, and secrecy are not helpful in trying to build consensus. Summarized by one lawyer as "lose the bark, keep the bite," preferred strategies are those which persuade the other side first to listen to you and then to (hopefully) accede or agree with you. Effective negotiators ask questions that reveal information, rather than holding forth themselves. They have a sense not only of when to be accommodating but also of when to be tough in order to protect their clients' interests, working incrementally to create trust and en-

10. *See* HERBERT M. KRITZER, LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION 130-34 (1991). *See also* JULIE MACFARLANE, THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW ch. 3(2008).

11. Macfarlane, *supra* note 6, at 298.

12. *Id.*

hanced solutions. They understand and develop norms of reciprocity with the other side, beginning with establishing comfort and rapport. This process requires good interpersonal and communication skills, including the ability to put the other side at ease, demonstrate respect and perhaps even empathy, and, most challengingly, create a shared sense of trust. The development of trust is key to exploring enhanced mutual solutions, and it requires effective explanation, persuasion, and personal authenticity:

> I want to persuade and get the other party to understand what my client wants, so there's that part of the persuasion, but it's more based on building a foundation first, the more they understand, the more they trust then the more likely they are able to understand why we think we want a certain thing.[13]

Conflict resolution advocacy also requires a certain amount of new knowledge, which can enhance the breadth and depth of the negotiator's skills. For example, skillful negotiators understand the distinctive dynamics of both distributive (divide up the pie) and integrative (expand the pie, then divide it) negotiations as well as the need to move between these two modes depending on the type and stage of negotiation. Understanding the dynamics in negotiation of both value claiming—where one establishes and holds to a "bottom line" or core components of an acceptable solution—and value creating—where one explores the additional benefits that the parties might jointly develop and distribute—creates balance and provides alternatives when one strategy gets "stuck." Lawyers who understand these different bargaining approaches can move with ease between them as circumstances require, and as a result they are proactive in shaping negotiation outcomes—for example by using an expanded range of options to identify priorities and negotiate trade-offs. Experienced negotiators are also sensitive to the importance of identifying and allowing for cultural differences in both the framing and the resolution of conflict, recognizing that disputants often need to relate the process and the outcome to their cultural (familial, community, organizational, ethnic) expectations and preferences.

Lawyers who are experienced in settlement advocacy settings identify a number of discrete negotiation skills—implicating both cognitive and emotional abilities and qualities—which enable them to be most effective. These include preparing an effective opening statement in negotiation or mediation, which adopts a firm yet not overly positional tone; matching the appropriate informal process to the case; displaying confidence and openness; and thinking outside the "box" of conventional, legal solutions in developing creative problem-solving skills. One frequently voiced observation is the importance of being able to conceptualize and understand the dispute from the perspective of the other side. Critical to being able to persuade the other side to settle on your client's best terms is an understanding of what the other side needs in order to be able to settle. The belief that the client's best interests can only be achieved if the interests of the other side are taken into account is a central premise of the principled bargaining approach popularized by Roger Fisher and Bill Ury and is widely identified in research on

13. MACFARLANE, *supra* note 10, at 112.

lawyer's negotiating techniques.[14] One experienced litigator offers the following description:

> Probably the biggest change I made was really thinking about . . . the opposing party's profile and really making an effort to put myself in his/her shoes . . . . I do that principally as I strategize the case.[15]

The practical importance of this approach becomes clearer when lawyers are focused on negotiation rather than trial. As one litigator put it, "You don't worry about the other side as much at a trial because they're the other side. When you're working towards a consensus—then it matters."[16]

VIII. REVISITING THE THREE KEY BELIEFS

The model of legal negotiations described here translates into practice many of the concepts of conflict advocacy discussed above. Consequentially it inevitably challenges the three key beliefs in many of the same ways and for the same reasons as conflict resolution advocacy. Both approaches question the assumption that all conflicts necessarily implicate rights. The claim of "principle" is attached to many disputes which, in their origins at least, appear to be wholly or primarily attached to the sharing of resources, including property, business interests or time with children, and implicating power, status, material wealth, reputation and other desired social symbols. While a principled argument can be—and usually is—constructed for each side's "moral" position, this may miss both the core of what the conflict is and potential solutions or accommodations. In addition, both conflict resolution advocacy and a model of earlier, "interests-aware" legal negotiations approach rights disputes differently than the traditional model. Both models question whether the only and inevitable place to resolve rights conflicts is in adjudication. Both understand rights and entitlements to be a part of a bargaining framework which can, if appropriate, include firm and explicit norm-based thresholds; for example agreeing in advance that payments shall be in line with or above child support guidelines, following conventions for interest percentages in structured settlements, or guaranteeing other statutory rights and protections. Interests bargaining and negotiation over rights entitlements can and must coexist.

The model of legal negotiations described here also makes clearer the limitations of the core belief in justice-as-process discussed earlier. The practical success of early "interests-aware" legal negotiations, mediation, and other settlement processes belies the assumption that justice can only be achieved from dutifully jumping through the (increasingly expensive) hoops of legal process. Lawyers are right to discourage their clients from assuming that they have a lock on judge-

14. *See generally* ROGER FISHER, WILLIAM URY, & BRUCE PATTON, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d ed. 1991). As well, the strategic importance of considering the interests of the other side is identified by Mather, McEwen, and Maiman as a convention in divorce advocacy. LYNN MATHER, CRAIG A. MCEWEN & RICHARD J. MAIMAN, DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE 115 (2001).

15. Julie Macfarlane, *supra* note 6, at 298.

16. *Id.* at 297.

dispensed "justice," but their substitution of the machinations of legal process for "justice" cannot feel satisfactory for many clients, especially (as procedural justice research shows us) where they do not directly participate in the process themselves. Clients do not necessarily share their lawyers' belief in the formal legal system as a fair process. What is more, the bottom line for many clients is practical solutions rather than an elusive and abstract sense of "justice." In these cases it may be important for the clients themselves to create their own sense of "justice" that enables them to live with the outcomes they choose, both practically and emotionally. They may need to participate in shaping different processes that give them a voice and the chance to be listened to and taken seriously. These same clients may also be unprepared or unwilling to hand over control and ownership of their dispute to their "lawyer-in-charge."

IX. THE LAWYER/CLIENT RELATIONSHIP: A NEW WORKING PARTNERSHIP

The changing conditions of legal practice and legal disputing also require the development of a new model for a working partnership between lawyer and client, one which is appropriate for the conditions of twenty-first century consumer needs and demands. The traditional assumptions of the lawyer-client relationship, including ownership of the conflict, control and decision making, and responsibility and participation,[17] are under scrutiny. The third of the three key beliefs—"lawyer-in-charge"—is challenged by the widespread decline in professional deference[18] and further problematized by changes in disputing procedures. The traditional assumptions of control and hierarchy are challenged when counsel and client are obliged to participate together in settlement-oriented processes. These procedural changes seem to be in tune with public attitudes, especially in the business community, about adapting legal processes to suit their particular ends rather than accepting the traditional model of the autonomous legal professional. The prohibitive cost of legal proceedings further encourages clients to ask questions about their lawyer's decisions over dispute resolution strategy. The days of handing over a file to a lawyer who makes the assurance "trust me, I'll handle it" appear to be significantly over, for both individual and corporate clients.

I shall focus here on two related aspects of the lawyer-client relationship which highlight the impact of these changes, and illustrate some of the philosophical and practical "terms" of a new relationship. These are (1) the negotiation of decision making and control between lawyer and client; and (2) the impact of

17. On issue of lawyer control see the classic work DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT : WHO'S IN CHARGE? (1974). *See also* Carl J. Hosticka, *We Don't Care About What Happened, We Only Care About What Is Going To Happen: Lawyer-Client Negotiations of Reality*, 26 SOCIAL PROBS. 599 (1979) (examining relationships between legal clinic lawyers and their clients).

18. Often referenced to the development of the World Wide Web and increasing ease of access to information formerly held by professionals; *see, e.g.*, Stuart Henshall, *The COMsumer Manifesto: Empowering Communities of Consumers Through the Internet*, FIRST MONDAY issue 5, http://firstmonday.org/issues/issue5_5/henshall/index.html. A similar phenomenon is evident in the changing relationship between doctors and their patients. *See, e.g.*, the classic work of Thomas S. Szasz & Marc Hollender, *A Contribution to the Philosophy of Medicine : The Basic Models of the Doctor-Patient Relationship*, 97 ARCHIVES OF INTERNAL MEDICINE 585 (1956).

client participation in the settlement process. Both are key elements of a new working partnership between lawyer and client.

X. DECISION MAKING AND CONTROL

"[I want to be] in the mix at all times."[19]

Reframing the lawyer-client relationship as a working partnership has profound implications for the balance of power in lawyer-client relationships. A partnership gives the client far greater power not only to review and critique decisions but also to participate in making them. This shift of power also requires clients to take far greater responsibility for choices and outcomes. An explicit transfer of responsibility is especially marked where clients directly participate in process and decision making as they do, for example, in Collaborative lawyering:

> The overall responsibility has shifted to the clients. We tell the clients they are responsible for the problem. We are going to help you to fix it. We will give you the mechanism, the procedure for resolving it. But it's not our problem. Before, I think too many lawyers would make their clients' problems their own.[20]

In Collaborative Law, clients are expected to take an active part in planning, analysis, and the formulation of strategy. Collaborative lawyers expect to have frank conversations with their clients about choices of approach, tactics, and options. Similar adjustments in the participation of the client in planning and decision-making occur where lawyers find themselves in mandatory settlement processes that require the participation of their client. The contrast with the "old style" is made clear in this interview with a younger lawyer:

> Interviewee: Counsel who practi[c]ed for many years under the old style . . . I think that they had a stronger sense of their lead role . . . of their role in making all decisions on how a case should be managed.
>
> Interviewer: Rather than sharing those decisions with the client?
>
> Interviewee: Rather than getting the client as involved as they are involved under mandatory mediation.[21]

When the development of strategy and the conduct of negotiations are no longer under the sole control of the lawyer, the extent and type of information that counsel needs from her client are also quite different than in the traditional paradigm. Instead of filing the pleadings and waiting for the legal process to grind

19. MACFARLANE, *supra* note 10, at 138.

20. JULIE MACFARLANE, THE EMERGING PHENOMENON OF COLLABORATIVE FAMILY LAW (CFL): A QUALITATIVE STUDY OF CFL CASES 43, Canada 2005, *available at* http://canada.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2005_1/2005_1.pdf.

21. MACFARLANE, *supra* note 10, at 140.

along, mandatory settlement meetings force lawyers to ready their case for negotiation at an early stage. Practically speaking, they need significant input from their clients in order to do this effectively. In anticipation of early mediation, there are many questions that the lawyer now needs to ask at the planning stage—questions that only the client can answer and that are not necessarily related to making the legal case. If decision making is to be undertaken jointly, there should be no surprises for the lawyer in a future meeting, Collaborative negotiation, or mediation:

> I ask them [the client] "what's really going on in the dispute?" If they're the defendant, what they really think the reason for the dispute is? If they're the plaintiff, what they think the reason is that the defendant isn't doing what they want them to do? What's the real reason behind it—do they have financial difficulties, that type of thing.[22]

> For instance, in commercial areas you want to know about the business relationship between the two parties—how long it's been going on, what future opportunities there are together, whether there is an interest in keeping the relationship together for long-term purposes or other business opportunities and so you want to know a lot more about that than you would if you were strictly looking at that case at hand and the legal rights in the dispute issue.[23]

The different type and volume of information shared between lawyer and client in this model is not only the result of the lawyer needing more information and asking more questions. Expanding the number of issues that will be considered is a natural consequence of engaging the client more completely in the development of the case and in the dispute resolution strategy. If he is directly involved in planning for mediation, for example, a business client is likely to provide additional information on business needs and goals, both long-term and short-term, which can be effectively incorporated into planning a strategy for negotiation. Issues that would not be apparent otherwise may surface. Instead of removing emotional and psychological issues from the negotiation, the inclusion of clients in planning may mean that important and otherwise unspoken barriers to settlement can be raised and discussed.

Not only does counsel need different and expanded information from her client in order to make effective use of early settlement processes, she may also find herself relying to a far greater degree on what her client tells her. Whereas discoveries and subsequent lawyer-to-lawyer negotiation allow counsel to verify what she has been told by her client and gather appropriate supporting evidence for a claim, early negotiation or mediation implies a greater degree of reliance on the client's information and a relatively lesser degree of reliance on legal arguments in the preparation of the case.

Reconceiving lawyer-client relations in this way means that much of the weight of both moral and practical responsibility shifts from the lawyer to her client. Depending on the extent to which counsel embraces a working partnership

22. *Id.* at 140.
23. *Id.*

with her client, this shift may be a significant one or it may be more marginal—but it will occur in some way. This rebalancing relieves a significant source of stress for many lawyers, who testify to the impact of stress in their working lives and, in particular, to the toll exacted by litigation: "I hated taking these things home with me. I really worried about the outcomes. I would be up to 2 a.m. preparing."[24]

Not all lawyers welcome the opportunity to relinquish their customary approach to file management. Some find setting aside their conventional assumptions about control an unsettling and disconcerting experience. Relying on the client for information prior to a Collaborative negotiation or mediation may be nerve-racking and is certainly counterintuitive for lawyers accustomed to the lawyer-in-charge model. The extent of this anxiety among lawyers is illustrated by its prevalence among even those Collaborative lawyers who have explicitly opted for a settlement-only approach. Even where lawyers are committed to working with their clients in a working partnership, some of the consequences may prove to be less than welcome—for example, where their clients become sufficiently self-confident that they meet without their lawyers and make a "kitchen-table agreement" or where the client is so "empowered" that she questions the final bill.[25]

A similar ambivalence over the reality of sharing control is sometimes voiced by clients. Some clients resist participating in planning or implementing joint strategies, preferring to hand over their dispute to their lawyer in a more traditional fashion and to give him or her control over the file. Clients usually seek clear guidance and advice from their lawyers, even if they are comfortable with taking final responsibility for decision-making and choice. In some lawyer-client relationships the client is sufficiently experienced that she needs little more than the lawyer's opinion before making a decision. In others the client needs "educating" in order to be able to make an informed choice. A good example of this is the degree to which previously financially inexperienced partners in divorce (often the wife) are asked to consider the data and make their own decisions about financial support. One family client described a conversation in which her lawyer explained a financial issue and then asked her if she understood: "I said no, [I don't], but I trust you."

In this instance her lawyer—a Collaborative lawyer—was not willing to accept her abdication of responsibility and pressed her further.

He replied, "No, K., you need to understand this issue to make a decision about it." So he explained it again and asked me what I thought.[26]

This client acknowledged that this was part of the bargain she understood between herself and her lawyer—one which was explicitly described in terms of a partnership. It is easy to imagine another client resisting or rejecting this approach.

An important example of circumstances in which the lawyer is responsible for the "education" of the client to enable informed decision-making relates to choices over different dispute resolution processes. In an authentic working partnership between lawyer and client, consideration of dispute resolution options must go

24. *Id.* at 141.
25. See the discussion in *id.* at 141-42.
26. *Id.* at 142.

further than the lawyer simply recommending her preference for one particular course. Counsel should present a range of options to her client rather than proposing one approach—her favorite or preferred process. A willingness to expose the client to the possibility of a range of dispute resolution options is especially important given the weight that clients often attach to their lawyer's personal opinions. Where a lawyer is positive or negative about a particular procedure, it is extremely influential in determining the client's own views. If a process option is either not discussed, or dismissed with minimal explanation, individual clients and one-shotters,[27] in particular, may not have the experience to press further or ask questions and are likely to simply accede to their lawyer's preference. Research shows that lawyers who are positive about mediation seem to have clients who feel positive about mediation, and, similarly, lawyers who are negative and dismissive about mediation tend to engender the same attitude in their clients.[28] Equally, offering the client a single option or course of action and asking them to "decide" is not authentic shared decision making, whether this is rights-based adjudication or an alternative.[29]

In relation to choices about dispute resolution processes, as well as other legal and procedural questions, counsel has access to more reliable, technical information than her client and can present it in such a way as to make the client's decision inevitable. The balance between client autonomy and lawyer judgment (or paternalism) is a delicate and difficult one and always depends on the needs of the individual client. If a client is to participate authentically in decision making, the choices available to her ought not be limited without her explicit and informed consent. In a working partnership, the choices made by the client may not always jibe perfectly with the lawyer's own preferences, but, without real choices, it cannot be a real partnership. Once the client is offered choices and has been fully briefed on both their implications and the counsel's own preferences, the lawyer needs to be able to step back and let the client decide.

The interaction of information and choice goes to the heart of the changes that are taking place in the lawyer-client relationship. This can be a difficult transition for both lawyers and clients habituated to the "old" approach. From law school on, lawyers are trained to take responsibility for directing their clients towards what they believe to be "best" for them—in this way the lawyer-in-charge belief is seeded and sustained. Finding the balance between continuing to offer expertise—which is, after all, what the client is paying for—and respecting the autonomy of clients in setting their goals and determining their best interests is complex and challenging. It is further confounded when the client directly participates in dispute resolution efforts such as negotiation, mediation, or judicial settlement conferencing.

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27. *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (explaining the "one-shotter" concept).

28. JULIE MACFARLANE & MICHAELA KEET, LEARNING FROM EXPERIENCE: AN EVALUATION OF THE SASKATCHEWAN QUEEN'S BENCH MANDATORY MEDIATION PROGRAM 24-25 (2003).

29. For example, the fact that all but one member of the family bar in Medicine Hat, Alberta, have adopted a collaborative approach to family law raises a question over genuine client choices. MACFARLANE, *supra* note 10, at 144. For further discussion of client decision-making in collaborative law, see Macfarlane, *supra* note 4, at 210.

XI. CLIENT PARTICIPATION

It completely caught me off guard at first. The first few mediations, I hadn't had any mediation training. My only training was the general attitude in the profession that this is a lot of horse crap and I had settlements hit me between the eyes and I couldn't believe my clients sold out on me the way they did. I was concerned that I had a serious client-control problem.[30]

This lawyer is describing his early experiences with bringing a client to a mediation session. Having his clients present redirected the locus of control in a way he did not expect and did not plan for. In informal settlement procedures, lawyers have far less control over the proceedings and need to be able to understand how their client will behave and how to relate to him throughout the process. The new lawyer needs to not only be able to minimize any negative consequences of the client being present but also to maximize the benefits.

Whether in a Collaborative four-way meeting, a mandatory mediation, or a judge-directed settlement conference, the presence of the client changes the practical dynamics of decision making. Instead of the lawyer bringing a proposal back to the client from the other side and presenting it to the client with her own overlay of analysis and recommendations, decisions in mediation may be made on the spot as new offers emerge or solutions develop.

The past thirty years have seen the introduction of a range of dispute resolution processes that either mandate or strongly encourage client participation. Jacquie Nolan-Haley suggests that the strength of the trend towards client participation changes the questions about the involvement of clients from "whether" to "how." She writes, "[t]he critical decision-making questions in mediation are concerned not with the extent to which clients should be allowed to participate, but rather the manner in which lawyers should be involved."[31] Some might see such an assessment as premature, especially in light of the tactics adopted by some lawyers aimed at ensuring that the participation of their clients remains minimal and tightly controlled (see the discussion below), but it presages a change in practice that has fundamental implications for the balance of power between lawyer and client.

Whatever the extent of the clients' role in practice,[32] the cooptation of the client as a player in negotiations constrains the lawyer's autonomy to play the conflict out relying solely on his own strategies. Similarly, Collaborative and Cooperative lawyering protocols promote negotiation in four-way gatherings that include the clients. Once counsel has recovered from the culture shock of sharing space in a negotiation setting with his client, the results can be very positive. One lawyer described the contribution made to negotiation by clients as:

> [T]he intangibles that a lawyer can't bring. Like what was said at a particular meeting when the deal was done or what everybody's perceptions were of what was going to transpire. So that you can sort of retrace the

30. Macfarlane, *supra* note 6, at 301.

31. Jacqueline M. Nolan-Haley, *Lawyers, Clients, and Mediation*, 73 NOTRE DAME L. REV. 1369, 1379 (1998).

32. *See, e.g.*, Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001).

> chain of events that lead to the dispute and see where everybody's expectations have fallen short, not just the claimant's expectations.[33]

Lawyers' attitudes towards preparing for, and encouraging, client participation in dispute processes are in many ways a litmus test for how far they are willing to share control and decision making more broadly in a partnership—or whether the old hierarchy will reassert itself. Inevitably this is at least partly a matter of learning from experience. This means more than a brief conversation outside the settlement conference room or mediation venue (which is still typical).[34] Counsel experienced in mediation and other convened settlement processes have learned that bringing a client with them who is not prepared and has not agreed in advance on how to present the issues (for example, how much and what information to disclose, or what options to canvass) may be a recipe for disaster. As this lawyer reflected:

> I am much more involved with the client in terms of what we're going to say and what we're not going to say in a mediation case as opposed to a standard litigation, because you just have to micro-manage what your client's saying in a mediation because if it doesn't settle, you've let time bombs loose.[35]

The uneasiness with which inexperienced lawyers often approach the participation of clients in settlement processes speaks volumes about how much this challenges conventional lawyer-client norms. Sometimes their anxiety is so overwhelming that they use their control to ensure that their client's participation is minimal and that the discussion remains dominated by the lawyers, with the goal that the lawyers will dominate the proceedings and their clients will simply be "wallflowers." Lawyers are surprisingly candid about resorting to this strategy. In the following examples, "them" refers to clients in general:

> I'll warn them—I say if you're saying stuff and I can't tell you in a quiet way I will kick you—so they know it's coming.[36]

> I teach them to "shut-up."[37]

Nancy Welsh argues that there is significant evidence of the assimilation of court-connected mediation (where lawyers are customarily required to attend with their clients) into a model of adversarial litigation practice. She writes that "[c]ourt-connected mediation of non-family civil cases is developing an uncanny resemblance to the judicially-hosted settlement conference," hallmarks of which

33. Macfarlane, *supra* note 6, at 272.

34. One client in the original Toronto alternative dispute resolution pilot told the evaluators that the first time his lawyer told him that they were going to a mediation meeting that day and not, as he expected, to a hearing before a judge was when they were driving into the city that morning. MACFARLANE, *supra* note 8, at 41.

35. Macfarlane, *supra* note 6, at 275.

36. MACFARLANE, *supra* note 10, at 147.

37. Macfarlane, *supra* note 6, at 275.

are a lack of direct client involvement and a focus on the legal arguments and their relative merits.[38] Unless both lawyer and client embrace a new partnership model, new processes that are inclusive of clients will actually look and function in a very similar manner to traditional ones. Some clients complain that their lawyers often fail to prepare them fully, or to consult them on how to use the process effectively. There is also some evidence that some clients are extremely dissatisfied with being excluded or silenced by their lawyers in mediation. Client participants sometimes note that in fact they are more solution focused and less emotional and rigid than their lawyers.[39]

The greater the experience of counsel with settlement processes that include the client, the more open they appear to be to accept client participation. These lawyers also regard efforts to exclude or silence clients as counter-productive:

> You can see some lawyers come in and they don't let the clients talk, they read the brief, they dominate the discussion, they're trying to push the mediator. And when that happens I go okay, we're not going anywhere, fine. . . . I think it's too bad generally because it robs the process of much of its practical value when you do that, because it controls the understanding of the clients too heavily.[40]

Increasing confidence with working with clients in settlement processes also seems to engender a different attitude towards the potential risks of the client "speaking out of turn":

> I don't see the harm in it, if my client says off the record "so you think those things we delivered didn't work?," I don't really see that as really hurting me because probably my client's going to have to say that on discovery, or it's going to be proven out one way or another. So if my client says that in those circumstances, I don't think you're giving much away. It's going to come out anyway and, quite frankly, sometimes showing that bit of weakness is worthwhile if the object is to settle this. Somebody's got to give something.[41]

These lawyers see the potential for the client to play a highly practical role in proposing and testing possible solutions. A working partnership between lawyer and client aims to produce superior solutions—that is, superior to those solutions negotiated privately by lawyers or imposed by a judge. Involving clients in negotiation and mediation processes can significantly advance this goal.[42] Face-to-face interaction allows parties in both domestic and commercial disputes to explore their understanding of what feels fair and realistic and to refine details that might

38. Nancy A. Welsh, *supra* note 32, at 25. Welsh argues that this is the price that has been paid for the legitimacy bought with the institutionalization of mediation within the court system.

39. *See, e.g.*, MACFARLANE, *supra* note 8, at 55; MACFARLANE & KEET, *supra* note 28, at 24-26.

40. Macfarlane, *supra* note 6, at 274.

41. *Id.*

42. *See, e.g.*, MACFARLANE & KEET, *supra* note 28, at 12-14; and Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 401 (2002).

otherwise follow a standard or assumed path. There is room for "honest assessments of the big picture."[43] There is the potential for value-added outcomes that include creative substantive dimensions not forthcoming in other fora, as well as secondary benefits such as enhanced communication and relationships. The new lawyer needs to take seriously the participation of their clients in dispute resolution processes and to work on constructively managing the consequences of this change, as well as their anxiety about it.

XII. THE FUTURE FOR THE NEW LAWYER

In this paper I have presented some models for a modified client service model for the new lawyer who is responsive to the changing conditions of legal disputing as we enter the twenty-first century. These ideas are not uncontentious, and some lawyers will resist them. Resistance to change is natural and is likely to be especially prevalent where the stakes are high—and law is an elite profession. However the landscape of legal disputing has changed dramatically, and this is our present reality. As William Felstiner points out, "Change and resistance are inextricably tied together in an oppositional tension where the weight shifts gradually from one to the other, even shifts backwards at times, but in the long run runs in the direction of change."[44] It might be wise for the profession to get ready for the pace of change to speed up. What has changed already will not change back. And there is much more change on the horizon as the basis for resistance is increasingly eroded. What is more, evolution and adjustment to change are the hallmarks of a vibrant profession.

The compound effect of the economic and structural changes that have occurred over the last thirty years has been to greatly increase the likelihood of young lawyers practicing in larger firms, in a specialized area, and for corporate clients. This effect, in turn, has turned up the competitive heat in the larger bar associations, with increasingly adversarial approaches to advocacy becoming associated with big firm commercial practice. These changes are significant for how young lawyers, in particular, understand the core values and goals of the profession that they are entering. Since large-firm corporate/commercial practice generally garners the largest fees, the highest salaries, and most prestige, these highly adversarial lawyers have become role models for many young lawyers. Ask a class of law students whom they regard as a role model and what they associate with "success" in legal practice, and a few dissenters aside, you will hear a discussion focused generally on aggressively self-confident personalities, self-promotion, adversarial behavior, high salaries, and high-profile cases and clients.

Yet the rise of adversarialism and an increasing focus on competitive big-firm practice is entirely at odds with many of the most significant changes that are occurring in legal practice—namely, the unmistakable shift away from trials and towards settlement processes that rest on less adversarial norms. These processes require the development of both a skill set and a mindset that, while building on traditional approaches to lawyering, have many distinctive and novel qualities.

43. Unpublished data from the Collaborative Lawyering Research project.

44. William L.F. Felstiner, *Reorganisation and Resistance, in* REORGANISATION AND RESISTANCE: LEGAL PROFESSIONS CONFRONT A CHANGING WORLD 1, 8 (W. Felstiner, ed., 2005).

The most successful lawyers of the next century will be practical problem solvers, creative and strategic thinkers, excellent communicators, persuasive and skillful negotiators, who are able and willing to work in a new type of professional partnership with their clients. Many lawyers have told me that this modified approach to legal practice resonates with their own changing norms and habits of practice, and fits better with their personal value systems than the old warrior model. These are the new lawyers, who are competent and competitive in the new conditions of legal practice, and market forces will ensure their numbers will only increase.

There will not be just one type of new lawyer. In fact, diversity rather than conformity is embedded in the concept of the new lawyer. There is a need for diversity of lawyers and lawyer styles to meet different client needs. There is also the realization that no one process of dispute resolution can be appropriate for all conflicts and that many different options should be contemplated and assessed by lawyer and client together. There will also, of course, continue to be many different arenas of professional practice for lawyers, but each practice setting will need a plan for the future that embraces change and anticipates more to come. While some lawyers may choose to prefer, for example, Collaborative family law practice on Main Street over corporate commercial work on Wall Street (and vice versa), neither of these worlds can escape the impact of the other, and both are a part of the future of legal practice. Mandatory mediation and case management apply similarly to commercial litigation as they do to small claims or family matters. Corporate and institutional clients have just as many reasons to prefer cost-effective settlements as a personal client on a limited budget. Both Wall Street and Main Street firms need a business model that enables them to stay competitive in an era of paralegals, in-house counsel, and other specialists. Every member of the legal profession is affected by negative public attitudes towards lawyers and justice systems, and they must be ready to take on this challenge by listening to clients, making changes, and promoting the values of professionalism and integrity.

There is an as yet unresolved normative tension between economic and broader cultural (procedural and social) changes facing the legal profession. This tension necessitates a debate over the values and norms of the profession that is unafraid to open up entrenched, even sacred, beliefs in order to develop new—appropriate, contemporary, and responsive—models of professional identity. There are expressions of ambivalence, dissatisfaction, and incompleteness everywhere among new lawyers entering the profession. This is especially apparent in relation to key aspects of the lawyering role that have historically enjoyed fairly stable norms and patterns of behavior—for example, client advocacy and lawyer/client relationships. Lawyers must adjust these and other core characteristics of the lawyering role to accommodate new conditions and expectations.

A coherent professional identity for lawyers requires an integration of these changes into their values, behaviors, and goals for their future careers. Satisfied and fulfilled professionals are those who possess a clear sense of professional identity and purpose. This is a worthy goal for both new and older members of the profession in these times of change. The emerging model of the new lawyer offers present and future members of the profession the philosophical and practical framework for a renewed sense of focus, commitment, and satisfaction.